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Supreme Court of the United States

OCTOBER TERM, 1954.

No. ~~780~~ 88

MARGERET SHIVER WILLIAMS,

Petitioner,

versus

CAROLINA LIFE INSURANCE COMPANY, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (AND BRIEF IN SUPPORT.)

ROBERT CULPEPPER, JR.,
FRANK S. TWITTY,
Camilla, Georgia.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. .....

MARGERET SHIVER WILLIAMS,
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versus

CAROLINA LIFE INSURANCE COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (AND BRIEF IN SUPPORT.)

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on February 23, 1954, rehearing denied on March 20, 1954, and extraordinary motion for rehearing denied on April 21, 1954.

OPINION BELOW.

The opinion of the Court of Appeals has not been reported but a copy of same will be seen at pages 147 through 154 of the Record. The opinion reverses a judgment of the District Court for the Middle District of Georgia in connection with which no opinion was rendered.

JURISDICTION.

The judgment of the Court of Appeals having been entered February 23, 1954, (R 155) and that Court having denied petition for rehearing on March 20, 1954 (R 172) and extraordinary motion for rehearing denied on April 21, 1954, (R 183) the jurisdiction of this Court is invoked under 28 US Code, Section 1254 (1).

QUESTIONS PRESENTED.

1. Whether, in actions under accidental insurance policies where the fact of accident is dependent on circumstantial evidence, the Court of Appeals erred in laying down a novel and restricted standard of proof, in holding that although the evidence shows the death accidental, and of the sort charged in the petition, the cause fails because insured might have met his death *accidentally* in more than one way, all of the sort charged, thus requiring petitioner to "pin-point" the details of the accident, and confusing the real question in the case as to whether the death was accidental, or not accidental, with the inconsequential question of whether the exact and minute details of a proven *accidental* death are shown.

The failure of the Court of Appeals to comprehend the real question in this case constitutes error, and is in direct conflict with the laws of Georgia, rulings of Fifth Circuit Court of Appeals, other circuit courts, and the

United States Supreme Court, in that the effect of the ruling

(a) Completely abrogates the preponderance of evidence rule in Georgia in determining civil cases based on circumstantial evidence and requiring that in deciding such issues the jury must be free of any doubt, and

(b) Applies to the determination of a civil cause, based on circumstantial evidence, the rules obtaining in criminal cases, that is, that the cause of action must be established to a moral and reasonable certainty, and beyond a reasonable doubt, and

(c) Usurps the function of the jury as fact triers, there being in this case no error of law in the trial involved, and the *undisputed, direct* evidence pointing conclusively to the fact of accidental death, of the sort charged, and it being admitted by respondents in their brief before Circuit Court that jury was authorized to find from medical evidence that he did not die from natural causes, and in this situation the jury was deprived of the right to infer, from circumstances based on *undisputed* and *preponderating direct* evidence, that the death in this case was accidental.

STATEMENT OF CASE.

The action is a consolidated proceeding brought by petitioner against respondents to recover for the accidental death of her husband under policies of insurance issued by respondents whereby the latter promised to pay to the former stated sums for the loss of life of her husband, resulting from bodily injuries, "effected solely through external, violent and accidental means" provided that disease or infirmity did not contribute to the death of the insured.

Plaintiff received jury verdict for $20,500, and timely judgment was entered, which was reversed by the Court of Appeals.

Insured had left his horse in the pasture of a friend for several days looking toward sale to the latter. (R 49.) After lunch on date of death, deceased, along with young daughter of his friend, and another young girl, went to the pasture to catch the horse for them to ride, stopping at tenant house, leaving girls there, getting several ears of corn to entice the horse, and going into the pasture, of some size, without bridle or saddle, to catch the horse and bring him back in. (R 35, 36.) He had ridden the horse many times before without bridle or saddle. (R 77.) He was seen on far side of pasture beckoning the horse to come to him, (R 38) but was not thereafter seen alive. An hour or two later, his lifeless body was found several hundred yards from the house, lying on his back on the ground in an open place, with his hands outstretched, with ears of corn, one bitten by horse, thrown off to side, with hat thrown to side, small bit of dirt in face, and small cut on

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cheek, from which blood had flowed directly to ground over his ear, and not down his face. (R 36, 41, 42.) There were heavy horse tracks leading up to his body from direction of far side of pasture, more deeply impressed at body, and then light horse tracks leading away from his body, in another direction. (R 42, 43.) Horse hair of the color of the horse was found in crotch of his trousers, which had been freshly laundered when put on that morning. (R 78.) There were no human tracks leading to or from the point where the body was found. (R 42.)

The deceased was 39 years of age, weighed over 200 pounds, was over six feet tall, not fat but of muscular build, never suffered any serious illness in his life and was feeling good on the morning of his death. (R 76.) There was no suggestion of suicide or foul play in the record.

In addition to cut on cheek of deceased, an autopsy was performed which complied with policy provisions as to external injuries.

SPECIFICATION OF ERROR URGED.

The Court of Appeals erred:

1. In prescribing a standard of proof in accidental cases requiring jury to be free of doubt as to how accident happened, although it appearing that the death involved was accidental of the sort charged in the petition.

2. In abrogating the preponderance of evidence rule in Georgia in determining cases based on circumstantial evidence.

3. In applying to the determination of this case, based on circumstantial evidence, the rules obtaining in criminal cases, that is, that plaintiff's cause must be established to a moral and reasonable certainty, and beyond a reasonable doubt.

4. In usurping the function of the jury as fact triers, there being in the case no error of law in trial involved, and the *undisputed, direct* evidence pointing conclusively to the fact of accidental death, of the sort charged, and it being admitted by respondents in their brief before Circuit Court, that the jury was authorized to find from medical evidence that insured did *not* die from *natural* causes, and in this situation the jury was deprived of the right to infer, from *undisputed* and *preponderating direct* evidence that the death in this case was accidental.

REASONS FOR GRANTING THE WRIT.

The effect of the Circuit Court's ruling is to deny the jury its inherent right to find the facts, from a pattern of circumstances which dictate only one conclusion, and to lay down the novel and arbitrary rule in accidental death cases that it is not sufficient to prove accidental death of the sort charged, but is necessary, in the face of admitted proof that injury sustained was accidental in one of several kindred ways, to go further and detail the exact manner

of the accident, and the minute details thereof, which means that hereafter in the ambit of the influence of this decision, it will be impossible to prove any accidental death, or injury, by circumstantial evidence.

The decision is more far reaching than merely this case. It writes into every accident policy, regardlesss of its terms, the provision that no benefits will be payable unless there are eye witnesses to the accident, and provides no coverage when the painter, the farmer, the mechanic, and others are following their trades without the protection of eye witnesses.

The manifest general hurt in permitting this decision to stand, aside from the grievous wrong to plaintiff in this cause, is that it will constitute a precedent in all circumstantial evidence cases, the language of the decision so clearly pointing out that the evidence shows that deceased met his death in one of several *accidental* ways, all devolving around his relations with the horse, but since the jury could not reach a "definite conclusion" as to which of the *accidental* ways he died, and the infinitesimal details of that way, the cause fails.

Nowhere in the decision is it made to appear that the result turns on the true question of whether insured's death was *accidental* or *not accidental,* and if permitted to stand it openly impairs and aborts the terms of the insurance contract involved, which provides payment for death by *any* accidental means (the exclusions not being pertinent), and conflicts with the precedents of every appellate court affecting the forum in which this cause was tried.

BRIEF COMMENT ON FACTS.

In order that the court may properly consider our sincere charges that the Court of Appeals has in this cause laid down arbitrary standards of proof requirement in accidental cases where no eye witnesses present, and has completely abrogated rules of determination of civil causes by preponderance of evidence, and deprived right of jury to draw inferences, from direct evidence, of accidental death, we shall make brief comment on pertinent facts of the case.

FACT THAT INSURED MIGHT HAVE MET DEATH FROM DISEASE OR OTHER NATURAL CAUSES ELIMINATED FROM CASE.

In determining this cause, the Circuit Court of Appeals completely overlooked the fact that respondents here, in their reply brief before that court (page 20) conceded that the jury trying this cause was authorized to find that disease did not cause or contribute to the rupture of the aorta of deceased which caused his death.

We quote the admission in their brief, page 20, to which reference is made, as follows:

> "(4) Appellee contends that disease did not cause or contribute to the rupture."
>
> "(a) As to this evidence of Dr. Adams for plaintiff and of Dr. Funke for the defendant was in conflict. *The jury chose to believe* Dr. Adams on this jury question. We recognize that we can-

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not contend that the plaintiffs proof failed entirely on this question."

The death in this case was either from accidental means, or natural causes. The respondents eliminated the proposition that it was from natural causes, leaving the record in such state that it could only be held that he died from accidental causes, but with this helpful relief, the Court of Appeals yet fell into the error of holding, in effect, that the issue was not whether insured met his death accidentally, of the sort charged, as contemplated by his insurance contract, but whether or not we proved the inconsequential details of the accidental death, such as whether he was thrown from the left or right side of the horse, whether he was thrown in the air and fell, or merely slipped to the ground, whether the horse was running or walking when he fell, whether he was mounting the horse, and something unusual, unexpected or accidental happened, although voluntary, and, if so, on which side of the horse he was mounting, or whether he had dismounted and the horse reared and knocked him down, and *ad infinitum*.

We cannot believe, in the face of all of the precedents on this type of case, this will be permitted to remain as the standard by which cases involving circumstantial evidence are proven.

UNDISPUTED FACTS FROM WHICH JURY COULD DRAW INFERENCE THAT DECEASED MET DEATH ACCIDENTALLY AS CHARGED.

1. It was undisputed that deceased was found dead at a spot on open ground and that heavy horse tracks lead up to the body, deeper at that point, and lighter ones lead away, from which *undisputed, direct* evidence the jury could infer that deceased had ridden to this spot, that the horse was running, then reared up and threw him, and then walked away in another direction.

2. It was undisputed that the hat of deceased was thrown off some distance from his body, from which *undisputed, direct fact* the jury could properly infer that Williams had been on the horse, and was thrown in the air, and in the act his hat was thrown from his head and away from his body, which would not have been the case had he voluntarily dismounted the horse, or if not on the horse, and had merely slumped to the ground from heart attack.

3. It was undisputed that he had a cut on his cheek from which blood flowed to the ground over his ear, and not down his face, from which *undisputed fact*, the jury could properly infer that he received the cut from the horse in the act of being thrown or falling, since no blood flowed down his face, the wound had to be simultaneous with his fall and not prior thereto, and there being no bushes or trees around, the wound had to come from the horse.

4. It was undisputed that no human tracks lead to and from the point where the body was found, from which *undisputed, direct fact* the jury could properly infer that deceased rode the horse to the point of his accidental fall.

5. It was undisputed that there were horse hairs of the color of horse involved in the crotch of the pants worn by deceased at time, and that these pants were freshly laundered that morning, from which *undisputed, direct fact*, the jury could further properly infer that he rode the horse to the point of death.

CONFLICT OF DECISION WITH LAWS OF GEORGIA, CIRCUIT COURT OF APPEALS, AND UNITED STATES SUPREME COURT.

The question of the Court of Appeals laying down a new and arbitrary standard of proof in cases involving accidental death or injury proven by circumstantial evidence, is interrelated with and embraces our charge that the decision abrogates the preponderance of evidence rule, exacts the same proof as required for conviction in criminal cases, and usurps the function of jury as fact trier, and will be discussed as one problem, separating only the holdings of the several forums whose rulings have been cast aside in this case.

GEORGIA LAW ON PREPONDERANCE OF TESTIMONY, AND RIGHT OF JURY TO INFER FROM CIRCUMSTANCES, AND TO HAVE MENTAL CONVICTION ALTHOUGH NOT FREE FROM DOUBT.

Sections 38-105 and 38-106 (a and b respectively below), of the Code of Georgia of 1933, as amended, are as follows:

(a) "Moral and reasonable certainty is all that can be expected in legal investigation. *In all civil cases, the preponderance of evidence is considered sufficient to produce mental conviction.*"

(b) "By preponderance of evidence is meant that superior weight of evidence upon the issues involved, which, *while not enough to wholly free the mind from reasonable doubt*, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other."

These sections have been interpreted in Georgia to mean that in a civil case a plaintiff is not bound to prove his case beyond a reasonable doubt (*Seymour v. Bailey*, Supreme Court Reports 76, page 339(3), and "contentions may be proved as well by circumstances as by direct testimony, and in a civil case, the plaintiff is only required to establish his contentions by a preponderance of the testimony, and *he is not required*, even when relying on circumstantial evidence, to establish them to the *exclusion of every other reasonable hypothesis.* (*Central of Ga. Ry. Co. v. Trammell*, 23 Georgia Appeals, page 26(5).

And in *Southern Grocery Stores, Inc. v. Greer, 63 Georgia Appeals, page 583*, the court applied the follow-

ing rule in a case where the circumstances were not as capable of selection of one theory of accident, as in our case:

> "3. Where there is evidence which points to any one theory of causation, indicating logical sequence of cause and effect then there is a juridical basis for a determination as to how the event happened, and a jury will be authorized to *select this theory*, notwithstanding the evidence of other plausible theories with or without support in evidence."

And this is begging the question, for in our case, the various theories pointed out by the Circuit Court itself were *all accidental*, and of the *sort alleged*, and would all *support recovery*, and none would support the defendant's side of the question of whether death was *accidental* or *not accidental*.

RULE OF FIFTH CIRCUIT COURT OF APPEALS IN SIMILAR CASES SUPPORTING OUR POSITION THAT PLAINTIFF DOES NOT HAVE TO "PIN-POINT" DETAILS OF ACCIDENTAL DEATH.

May we quote from several Fifth Circuit Court of Appeals cases which clearly demonstrate that all that is required in cases of this class is that the plaintiff prove the *sort of accident* alleged, and that the jury does not have to be free of doubt in its findings, and does not have to reach a "definite conclusion" as to the details of the accident so long as there are circumstances, based on direct evidence, from which they might infer accidental death,

and so long as the facts are such that the minds of reasonable men may differ as to the fact of accidental death.

AETNA INSURANCE COMPANY v. CAFFEE, 286 FEDERAL REPORTER, PAGE 660, FIFTH CIRCUIT.

In the *Caffee* case, there were no eye witnesses and the circumstances were not as strong as ours and involved an elderly man suffering from disease. He was seen driving his car, from one side of road to the other going around lake, and was later found dead, on the ground, clear of his car, which had run into an abutment on or near the road. The Court of Appeals stated that the jury could have felt that he lost control over his car on account of physical condition, but that it was entitled to draw inferences from circumstances shown by direct evidence, that it was accidental. The trial court refused to charge jury that they should find for defendant if there was any doubt in their minds as to the cause of death of insured, which refusal was approved by Circuit Court of Appeals in this language: "The jury might have been in *serious doubt* and yet they might well have believed from the preponderance of the evidence, as they evidently did, that death was due to the cause alleged in the declaration. The Court of Appeals further said that under the defendant's contentions, "It would be practically, if not quite, impossible to prove an accident by circumstantial evidence."

The decision in our case, in which the court sets forth several *accidental* ways in which deceased could have

met his death, all involving relations of horse and insured, and then holds that jury must "definitely conclude" the exact manner of his *accidental* death, forever closes the door on proof of accidental death by circumstantial evidence.

NEW YORK LIFE INSURANCE COMPANY v. HATCHER, 115 F2d 52, FIFTH CIRCUIT.

This was a case with no eye witnesses, and involved a fall on the floor, without the intervention of any other agency, such as the horse in our case. Hatcher was an old and disabled man, and upon regaining consciousness after his fall, stated that he must have fainted. The Court of Appeals held that even so, his own declaration was not binding on his beneficiaries, and they could recover if they proved that death was "of the sort described". "Sort" means only of the "class or kind."

May we quote further from the *Hatcher* decision to show that the jury may "speculate" as to the details of the accident, if there is any evidence, circumstantial or direct, upon which it might base its "guess" or "speculation," as follows:

> "On the question whether the fall which caused the injury which in turn caused the death was an accident, or itself due to disease, we think the jury could from the circumstances conclude that the injured slipped and fell rather than that he fainted and fell. *Either was possible.*"

Bear in mind that the Fifth Circuit Court of Appeals in the *Hatcher* case permitted speculation as to whether

death was *accidental* or *not* accidental. In our case, the only speculation, if any was involved, was which of several related *accidental* ways the deceased met his death, and irrespective of result of the speculation, the end result of the jury speculation would be an *accidental* death, as contemplated by the insurance contract.

STEWART v. TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA 81 F2d 25, FIFTH CIRCUIT.

In this case there were no eye witnesses, a man was found on the floor of his hotel room, who had been ill for several days. The physical layout in the room indicated that a man might have possibly accidentally stumbled and fell. The district court directed a verdict for defendant, giving as his reason that there was no substantial evidence to go to the jury *"as to how the injury occurred."* The Fifth Circuit Court reversed the ruling holding that "if deceased did stumble, *or in any other manner accidentally fall* against some object, alone causing his death, we think clearly, the plaintiff is entitled to recover, for the fall and death would not have been due to disease." The jury, it was further held, was entitled to consider the situation and location of objects in the room, and other circumstances in determining "how the wound occurred."

Should not the Fifth Circuit Court of Appeals, in our case, have adhered to the standard in the *Stewart* case, and held that *"if the deceased did fall off,* or was thrown off, or knocked down by the horse, or *in any other manner did accidentally fall"* then we were entitled to recover.

It is conceded in the brief of respondents before the Circuit Court that jury could have properly found from *disputed* evidence that disease did not cause rupture of aorta. By the same token, and the rules obtaining, could not have reasonable and impartial minds, under the *undisputed, direct* evidence, concluded that Williams rode the horse to the point of death and was thrown—?

The jury had the right, although there might have been doubt as to the exact manner in which he was thrown, to have concluded that he was accidentally thrown or knocked to the ground by the horse. Further, even if he had fallen without the intervention of the horse, if it was an accidental fall, the plaintiff was entitled to recover.

According to the theory of Court of Appeals viewed in light of *Stewart* and *Hatcher* cases, we would have had more of an accidental case, if there had been no horse, and the deceased had merely been found dead in the woods, similar to *Stewart* and *Hatcher* cases, which is reducing the matter to the absurd, and places us under the paradox of weakening our case in order for it to be approved under existing precedents.

We make this argument by way of emphasizing the danger of permitting the decision in our case to stand.

THIS DECISION CONFLICTS WITH CASES FROM OTHER CIRCUITS.

While a much weaker case than ours, that of *Brownlee v. Mutual Benefit Health and Accident Association, 29 F2d, page 71, NINTH CIRCUIT*, poses the same question.

Can the jury speculate as to the sort of accident involved, so long as the facts support such an inference or speculation—?

This involved a man starting on mountain climb, running into snowstorm and never being seen again, dead or alive. Verdict directed for defendant, the contentions of insurance company in that case being similar to defendant's in our case, as follows:

> "Assuming that insured is dead, the proof leaves the manner of his death wholly in the realm of speculation. Based on conjecture his death may be explained in various ways, among which are the following: (1) That insured fell and sustained bodily injuries which resulted in his death (2) That insured became lost, and having exhausted his food supply, starved to death (3) That insured, having become tired and exhausted, stopped to rest and subsequently froze to death, or (4) that insured because of physical strain to which he had been subjected, died of natural causes."

The court, in reversing the direction of verdict for defendant, held that:

> "It was the province of the jury to determine from the evidence submitted whether the insured met with accident by falling into a crevasse of snow or ice, or into a canyon, or became lost and starved to death, tired and froze to death, or died from natural causes.
>
> . . . . *It is not necessary that evidence be of such weight as to preclude every possibility of error.*"

The *Brownlee* decision holds that the jury could speculate among several *accidental* means by which in-

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sured perished over against speculation that he died from natural causes. In our case the field of *speculation* is limited to selecting one of several *accidental* ways, admitted in the decision, in which insured met his death *accidentally* with the question of his having died from natural causes being eliminated.

This, of course, renders absolutely meaningless all of the precedents in this type of case in all forums.

CONFLICT WITH RULINGS OF U. S. SUPREME COURT.

The case of *U. S. Mutual Association v. Barry, 131 U. S. Supreme Court Reports, page 100, (33 L. Ed. 69)* involved three persons jumping to the ground from a platform several feet high. Two of them landed safely, while Barry was injured by the jump. There was no evidence of anything unusual in the jump. The jury found for plaintiff, and case found its way to the Supreme Court of United States, and judgment of lower court affirmed. As bearing on the question in our case, the trial court was requested to charge the jury that if plaintiff did not prove details of accident as alleged in petition, the defendant was entitled to recover. The court refused to give these instructions, confining the accident to "pin-point" details, but did charge the jury as follows:

> "We understand from the testimony, without question, that the deceased jumped from the platform with his eyes open, for his own convenience, in the free exercise of his choice, and not from any perilous

necessity. He encountered no obstacle in jumping, and he alighted on the ground in an erect posture. So far we proceed without difficulty; but you must go further and inquire, and here is the precise point on which the question turns: *Was there or not any unexpected or unforeseen or involuntary movement of the body, from the time Dr. Barry left the platform until he reached the ground, or in the act of alighting? Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self-control, in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he or not miscalculate the distance, and was there or not any involuntary turning of the body in the downward movement, or in the act of alighting on the ground?* These are points directly pertinent to the question in hand.

"And I instruct you that if Dr. Barry jumped from the pjlatform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected, or involuntary occurred, changing or affecting the downward movement of his body as he expected, or would naturally expect, such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated or would naturally anticipate, then any resulting injury was not effected through any accidental means. (But if, in jumping or alighting on the ground, there occurred, from any cause, any unforeseen or involuntary movement, turn, or strain of the body, which brought about the alleged injury, or if there occurred any unforeseen circumstances which interfered with or changed such a downward move-

> ment as he expected to make, or as it would be natural to expect, under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulting, then the injury would be attributable to accidental means.")

It appears that the jury was given the choice of finding that something accidental happened during the course of the fall in either of *several ways*, which we say is the rule in our case.

May we say that the *Barry* case has never been questioned or qualified by the Supreme Court in the many years since it was decided, and has been uniformly followed in the State of Georgia.

We humbly feel that the Supreme Court of the United States, in the case of *Lavender v. Kurn* (90 Law Edition, page 916, 327 US 645-654) completely destroys any semblance of correctness in the circuit court's decision in our case.

One cannot, with any degree of reason, accept both as the law of the land.

In the *Lavender* case a switch-tender was found dead near track with fractured skull shortly after he had thrown a switch to permit train to back in station, where it was shown that there was a mail hook hanging down loosely on the outside of the mail car of the backing train, and considering the height and swing-out of the hook, the existence of an uneven mound of cinders and dirt near

the track, and the nature of deceased's duties, it was held to be a fair inference that he had been struck on the back of the head by the hook, although there was contrary evidence indicating that he could not possibly have been hit by the hook, and it was possible that he might have been murdered by one of the many tramps frequenting the switch yards. *There were no eye witnesses.* May we quote briefly from the opinion written by Justice Murphy, as follows:

> "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factural dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for the appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller v. Atlantic Coast Line R. Co. 318 US 54, 67, 68, 87 L ed 610, 617, 618, 63 S Ct 444, 143 ALR 967; Bailey v. Central Vermont R. Co. 319 US 350, 353, 354, 87 L ed 1444, 1447, 1448, 63 S Ct 1062; Tennant v. Peoria & P. U. R. Co. 321 US 29, 35, 88 L ed 520, 525, 64 S Ct 409, 15 NCCA (NS) 647. See also Moore, Recent Trends in judicial Interpretation in Railroad Cases under the Federal Employers' Liability Act, 29 Marquette L. Rev. 73.
>
> "It is no answer to say that the jury's verdict involved *speculation and conjecture.* Whenever facts

are in dispute or the evidence is such that fair-minded men may draw different inferences, *A measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.* Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The Circuit Court cites the case of *Pennsylvania RR Company v. Chamberlin*, 228 US 333, 339, 53 S. Ct. 77 L.ed. 819, as authority for the position that circumstances equally consistent with several hypotheses prove neither, and that the party having the burden must fail.

The question in the *Chamberlin* case was whether accidental death, or not, and on the side of accidental death was evidence of circumstances from one who did not see the accident, as against direct evidence of several eye witnesses that the occurrence claimed by circumstantial evidence did not happen. There is no similarity between the two cases, or the issues therein.

Would the jury be authorized to find an accidental death in a case where a painter, in good health, was seen to mount a ladder to a house, with paint brush and bucket

prepared to go aloft and paint the house, and hours later he was found dead near the point where base of ladder was located, the ladder having fallen to ground, his cap thrown to the side, his bucket and brush thrown to the side, fresh paint high on the wall showing that he had been up the ladder painting on the wall, no cuts or abrasions on him except small cut on face from which blood was flowing to ground."

Armed with the decision in this case, defendants in an action for his accidental death, can then dare to boldly admit that the painter's death was accidental, but prevent recovery by showing that although it was accidental, the jury could not reach a "definite conclusion" as to whether the painter fell from the top of the ladder and was killed, or whether he descended the ladder and it fell on him and killed him, or whether he descended and stumbled and fell, and pushed the ladder over in the act of falling. The jury would have *to speculate* as to which of these accidental ways he met his death.

This is not the law of our land, and the danger of the holding in this case has such widespread application that this court should hear this cause and deter the harmful influence of this decision.

It was well and applicably said in the case of *William v. Reading Company*, 175 F2d, page 34 (305) that "it is not the rule that circumstantial evidence need exclude everything which the ingenuity of counsel may suggest as having possibly caused or contributed to the death."

CONCLUSION.

The points presented by this petition seem to us so important to all accident policy holders, and all parties who must prove their cause by circumstantial evidence, as to justify the consideration of this court.

Respectfully submitted,

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